In the Matter of the Arbitration of a Dispute Between

COTTONWOOD COUNTY, HIGHWAY DEPARMENT

Step Increase Grievance

and

BMS Case No. 16PA0797

AFSCME, COUNCIL 65, AFL-CIO LOCAL 578

APPEARANCES:

Ratwik, Roszak & Maloney, P.A., <u>Ms. Ann R. Goering</u>, Attorney at Law, appearing on behalf of the County

Mr. John Spieglehoff, Staff Representative, AFSCME Council 65, AFL-CIO, appearing on behalf of the Union

ARBITRATION AWARD

Cottonwood County, hereinafter the County or Employer, and AFSCME, Council 65 and Local 578, hereinafter the Union, are parties to a collective bargaining agreement providing for the submission of grievances to final and binding arbitration before an arbitrator selected by them. The undersigned held a hearing in the captioned matter on June 1, 2016, in Windom, Minnesota. The parties submitted post-hearing briefs, which were received by July 5, 2016.¹

ISSUE:

The parties wee unable to stipulate to a statement of the issues to be resolved by the undersigned. The undersigned frames the issues as:

1. Was the grievance timely filed in accordance within the contractually specified time limits?

¹ At the arbitration hearing, the undersigned requested the County and Union to waive the contractual requirement that he issue his decision within 30 days of the close of the hearing or submission of briefs, and they both agreed to waive that requirement.

2. Did the County violate the collective bargaining agreement and/or Memorandum of Agreement – 2015 Appendix A – Wage Schedule that the parties executed on December 30, 2014, when it did not grant step increases to employees in calendar year 2015 on or about their anniversary date/hire? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

ARTICLE V - EMPLOYEE RIGHTS GRIEVANCE PROCEDURE

5.1 DEFEINITION OF A GRIEVANCE

A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.

* * *

5.4 PROCEDURE

Grievances, as defined by Section 5.1, shall be resolved in conformance with the following procedure:

<u>Step 1.</u> An employee claiming a violation concerning the interpretation or application of this AGREEMENT shall, within 21 calendar days after such alleged violation has occurred, present such grievance to the employee's supervisor as designated by the EMPLOYER.

* * *

5.5 WAIVER

If a grievance is not presented within the time limits set forth above, it shall be considered "waived". If a grievance is not appeal to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled on the basis of the EMPLOYER'S last answer. If the EMPLOYER does not answer grievance or an appeal thereof within the specified time limits, the UNION may elect to treat the grievance is denied at that stop that immediately appeal the grievance to the next step. The time limit in each step may be extended by mutual agreement of the EMPLOYER and the UNION.

APPENDIX A

WAGES (2014 & 2015)

Heavy Equipment Mechanic

<u>Start</u>	<u>Step 1</u> *	*	*	*	*	*	*	Step 7
14.3021	14.7311							17.5898

Step 8 18.1175	*	*	*	*	*	*	*	*	Step 15 22.2822		
Engineer/Signage Technician											
<u>Start</u> 14.3021	Step 1 14.731		*	*	*	*	*	*	Step 7 17.5898		
<u>Step 8</u> 18.1175	*	*	*	*	*	*	*	*	Step 15 22.2822		
Heavy Equipment Operator											
<u>Start</u> 13.6572	Step 1 14.066		*	*	*	*	*	*	Step 7 16.7966		
Step 8 17.3005	*	*	*	*	*	*	*	*	Step 15 21.2774		

Employees assigned to work out of classification shall receive the rate of pay for the classification assigned at the same step increase for which they qualify on January 1st. Employees temporarily assigned to the job classification of Foreman will be paid one dollar and 30 cents (\$1.30) above the employee's regular rate of pay for each hour so assigned.

An additional two dollars (\$2.00) per hour will be paid to an employee who fills in as the Landfill Operator while the regular operator is not on duty.

Employees hired prior to January 1, 2005, shall have January 1st as their anniversary date.

An additional ten cents (\$0.10) per hour will be paid to an employee when the employee operates any of the heavy equipment listed below for more than two (2) hours during anyone shift; provided that the employee is considered to be a qualified operator and provided the employee is not classified as a heavy equipment operator: Distributor, Weed Sprayer, Dragline, Four Wheel and Cat Loader, Ten (10) ton Tandem Trucks.

Each employee covered under the terms of this Agreement will receive a \$100.00 clothing allowance for the purchase of a winter parka effective January 1, 2015 and every two (2) years thereafter. The laundering of the parka will be the sole responsibility of the employee.

Each employee covered by the terms of this collective bargaining agreement shall receive one step increase in each year of the contract applied January 1, 2014 and January 1, 2015. Probationary employees shall receive step increases after successful completion of probation.

MEMORANDUM OF AGREEMENT BETWEEN AFSCME LOCAL 578 – MINNESOTA COUNCIL 65 AND COTTONWOOD COUNTY 2015 APPENDIX A – WAGE SCHEDULE

IT IS HEREBY AGREED, by and between Cottonwood County (Employer) and AFSCME Local 578 County Highway Employees Union (Union) and that the following shall constitute the understanding reached between the parties with respect to revision of the 2014 wage schedule Appendix A

WHEREAS, as the Employer and the Union are parties to a collective bargaining agreement effective January 1, 2014 and ending on December 31, 2015.

WHEREAS, the parties desire to revise the current wage schedule to attract new hires, create competitive wages and also retain quality employees in the Cottonwood Highway Department.

NOW, THEREFORE, the Employer and the Union agree to the following:

- 1. The attached wage schedule-Appendix A shall constitute the agreement of the parties effective January 1, 2015 and shall be considered the status quo for future negotiations.
- 2. Effective November 3, 2014 the following employee shall have their wage increased to \$17.59/hour: Alex Yonker, Joel Grams, Joe Doblar, Kelly Brown and Jeff Yonker.
- 3. The following employees shall be considered "off scale" and shall be paid \$21.32/hour effective January 1, 2015; Dennis Erickson, Keith Willard, Gordy Zimmer, Scott Nesmoe, Chuck Barrie, Joel Rostmily, and Ken Sell. Any future across the board increases shall be applied to this hourly wage rate.
- 4. Effective January 1, 2015, the following employees shall be paid the following wage rates:

Joel Grams-\$19.22/hour Alex Yonker-\$17.59/hour Kelly Brown-\$18.11/hour Joe Doblar-\$18.11/hour Jeff Yonker-\$19.02/hour Steve Burdick-\$23.48/hour

5. All employees who are still advancing through the steps on the existing wage pay matrix and have not reached the maximum wage rate shall be eligible for a yearly step increase after a satisfactory job evaluation on their anniversary date.

IN WITNESS WHEREOF, the parties have caused this Memorandum of Agreement to be executed this 30th day of December 2014

FOR AFSCME COUNCIL 65

FOR COTTONWOOD COUNTY

BACKGROUND:

In late summer of 2014 the County was having difficulty hiring Heavy Equipment Operators (HEO) to fill vacancies due to the wage rate the County was offering to prospective employees. White, former County Commissioner, testified and the County Board of Commissioner's meeting minutes reflect that qualified applicants wanted more money than the County was offering to pay for a HEO. The Board minutes reflect that the County compensation committee and County Coordinator, Thongvivong, were already engaged in internal discussions regarding modification of its unionized non-law enforcement employee salary schedules. County Commissioners, Thongvivong and Neumann, Public Works Director/County Engineer were also discussing the difficulty the County was experiencing in filling HEOs vacancies, and possible changes to the wage schedule for Highway workers.

At the October 28, 2014, County Board of Commissioners meeting, Newman told the Board that she had met with the County Compensation Committee regarding a starting rate plus five step wage matrix with a 6% wage rate differential between steps for the Heavy Equipment Operators. She told the Board that the Compensation Committee did not approve of a start plus five step matrix, but would consider a start plus six step matrix with a 4% wage differential between steps and wanted more time to review the numbers. She told the Board that the Compensation Committee agreed to hire a Heavy

Equipment Operator at \$17.59/hour. The County Board approved a \$17.59/hour starting rate for HEOs while they continued to work on a new wage matrix.

She testified that at the November 4th County Board of Commissioners meeting she requested that five current Highway Department employees have their hourly wage rates raised to \$17.59/hour because she had already been given permission to hire two Heavy Equipment Operators at \$17.59/hour. Those five employees were Joel Grams, Joe Doblar, Kelly Brown, Alex Yonker, and Jeff Yonker. At that meeting, the Board approved Newman's recommendation.

At the November 18th County Board of Commissioners meeting the Commissioners voted to approve hiring Pfeiffer as Heavy Equipment Operator at \$17.59/hour. At that same meeting County Coordinator, Thongvivong, on behalf of the Compensation Committee, told the Board that the Compensation Committee recommended that employees move one step upon a satisfactory performance evaluation each year and that a minimum of a 1.5% COLA would be given each year. She testified that change was proposed because in the past employees did not have to have a satisfactory evaluation to move one step on the wage schedule each year. She also testified and County personnel procedures confirm that employee evaluations had to done each year and submitted to her office by November 1st.² The Board approved a motion that employees be moved one step upon a satisfactory performance evaluation each year and that the COLA be set according to the Social Security Administration. The Board also adopted the Compensation Committee's proposed 9 step wage matrix for non-union and union positions excluding LES union positions.

After the Board's November18th meeting, Thongvivong e-mailed Union representative Spiegelhoff stating,

"Attached is the FINAL matrix as adopted by the county board today. It's been a long time coming. Now we just need to place employees and move on. I have listed all of the union employees on the attached copy as well as what my thoughts are with placement of these employees. Keep in mind that I do not have a vote but these are my thoughts were I would feel comparable recommending to the board

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² Newman testified that in 2014 the deadline for completion of employee evaluations was November 1st. She said because of the number of evaluations that had to be completed by November 1st the County concluded it would be better if they could be spread out throughout the year and that was how the County came up with its proposal to have evaluations conducted on or about an employee's anniversary date.

where they get placed. There are four employees (Kelly Brown, Joe Doblar, Joel Grams, and Jeff Yonker) that may need further discussion as to their placement on the matrix. I think we can come to a workable solution that will be fair to everyone involved. I was able to get in contact with Jim Schmidt and we would like to meet with you on Wednesday, November 26th (the earlier the better) to discuss this. Please let me know your thoughts."

That newly negotiated wage matrix (wage schedule) for 2015, unlike the 2014-2015 collective bargaining agreement Appendix A wage schedule, is a 9 step schedule with steps labeled A-I. The 2014-2015 Appendix A wage schedule for Heavy Equipment Mechanic, Engineer/Signage Technician and Heavy Equipment Operator classifications was a 15 step schedule. The "Step 1" wage rate for Heavy Equipment Operator on the 2014 – 2015 collective bargaining agreement Appendix A wage schedule was \$14.0669/hour, whereas, the first step on the new 2015 wage matrix negotiated with the Union in November 2014 and attached to the Memorandum of Agreement was 16.58/hour at Step A. This was a substantially higher first step wage rate than the previous Step 1 wage rate. Also, the effect of condensing the wage schedule from 15 steps to 9 steps is that employees can get to the top wage rate (wage schedule maximum) in 8 years from date of hire if granted one step increase per year, as compared with the 14 years it would take to get to the previous Step 15 wage rate moving one step per year.

On November 24, 2014, the Monday after negotiating the new 2015 wage matrix with Thongvivong, Spiegelhoff e-mailed her stating,

"Here is my first shot at creating a MOU for the wage schedule we negotiated last Friday³. Could you please put together a final copy of the wage schedule for inclusion into this MOU? Let me know your thoughts."

Spiegelhoff's first attempt at drafting the MOA reflecting the agreement the County and Union had reached in their bargaining session on Friday, November 21st regarding the placement of the Highway employees on the just negotiated 2015 wage matrix included language very nearly the same as the final language of the MOA the parties executed on December 30, 2014. One difference was that Spiegelhoff's proposed 1st draft of the MOA language contained provisions providing,

"4. Joey Vought shall be paid \$17.59/hour effective 11/24/14."

³ The previous Friday was November 21, 2014.

5. Effective January 1, 2015, the following employees shall be paid the following wage rates:

Joel Grams-\$19.22/hour Alex Yonker-\$17.59/hour Joey Vought- \$17.59/hour Kelly Brown-\$18.11/hour Joe Doblar-\$18.11/hour Jeff Yonker-\$19.02/hour Steve Burdick-\$23.48/hour

6. The aforementioned employees in #3 excluding Steve Burdick and all new hires shall receive any applicable step increases on their anniversary date."

Less than 3 hours later Spiegelhoff again emailed Thongvivong stating,

"I have slightly revised the MOU in regards to #5 for clarity and also took out any reference to Joey Vought as the reference to Joey Vought is moot given the revision of #5. Please look it over and let me know what you think. If you are really confused, then call me."

Item #5 in this 2nd draft now read,

"5. All employees who are (sic) the current step system and have not reached the maximum wage rate will be eligible for a step increase after a satisfactory job evaluation on their anniversary date."

And, he no longer included in his second draft the language of item #6 from his first draft.

Then on December 2, 2014, Spiegelhoff emailed Thongvivong and attached another draft of the MOU/MOA. That draft, now his 3rd draft made changes to the second draft he had prepared and sent to Thongvivong on November 24th. In his 3rd draft Spiegelhoff prepared a new #5 and renumbered to the previous #5 to #6 and modified the language. The new #5 provided,

- "5. All employees who currently (sic) advancing through the steps and have not reached the maximum wage rate and (sic) not (sic) shall receive any step increase on their anniversary date."
- 6. All employees who are on the current step system and have not reached the maximum wage rate will be eligible for step increases after a satisfactory job evaluation on their anniversary date."

Twenty minutes later on December 2nd Spiegel off e-mailed a 4th draft of the MOU/MOA stating,

"Here you go. Talk to you soon."

In that 4th MOU/MOA draft Spiegelhoff removed the language of #5 contained in his 3rd draft and renumbered #6 that appeared in his 3rd draft to #5. Spiegelhoff's 4th draft item #5 read

"5. All employees who are still advancing through the steps on the existing wage pay matrix and have not reached the maximum wage rate shall be eligible for a yearly step increase after a satisfactory job evaluation on their anniversary date."

That was the final agreed upon language for item #5 that appears in the MOA the parties executed on December 30, 2014.

The MOA was effective on January 1, 2015, employees were placed on the new 9 step pay matrix as specified in the MOA and some increases, as specified in the MOA were retroactive to November 3, 2014. The parties do dispute that in calendar year 2015, no step increases were granted to bargaining unit employees on their anniversary date.⁴ On January 20, 2016, the Union grieved that the County had violated the December 30, 2014 MOA because it did not grant eligible employees a step increase on their anniversary date in 2015. The County denied the grievance at all steps of the grievance procedure arguing that the grievance was untimely because it had not been filed within the contractually required 21 calendar days after the alleged violation occurred. It argued that in an email dated January 14, 2014, the Union's calculation of back pay allegedly owed employees showed that the alleged violations occurred 36, 38, 112, 128 and 250 days prior the grievance being filed. It also denied that County Coordinator Thongvivong, or any other County representative, agreed employees would receive a step increase on their anniversary date in 2015, and that the discussion about anniversary dates related solely to the date that the performance evaluation was to be conducted. The grievance was processed to arbitration and presented at hearing before the undersigned.

DISCUSSION:

The County raised a threshold procedural issue that the grievance was not timely filed barring the undersigned's consideration of the merits of the grievance. The Union Steward dated the grievance January 20, 2016. On January 28, 2016, Public Works Director/County Engineer, Newman, denied the grievance in writing, the Union appealed the grievance, and on February 10, 2016 County Coordinator, Thongvivong, also denied the grievance in writing and in her denial offered to waive step three of the grievance procedure and move the grievance to step four. The next day, on February 11, 2016, Spiegelhoff notified Thongvivong in writing that the Union was appealing the grievance to step four – arbitration. The County's reasons for its denial of the grievance as set forth in Newman's and Thongvivong's written answers were twofold. First, the grievance was not timely because the Union had waited until January 20, 2016, to file its grievance alleging the County had violated the MOA when it did not grant a step increase to highway employees on their anniversary dates in calendar year 2015, when the parties' collective bargaining agreement required that grievances be filed within 21 days of the date of the alleged violation. Second, both Newman and Thongvivong contended that Appendix A of the collective bargaining agreement provided that step increases are to be granted on January 1st and that paragraph #5 of the MOA did not change that. The County's answers to the grievance asserted that paragraph #5 of the MOA and the negotiations leading to its insertion in the MOA related solely to the County's desire to have evaluations conducted with the employee on his/her anniversary date and not November 1st as had always been done in the past. They also argued that at no time in their meetings with the Union when discussing that employee evaluations would occur on an employee's anniversary date did the County ever agree that the step increases would no longer be granted on January 1st as provided in Appendix A of the collective bargaining agreement.

The Union argues that the grievance was timely filed after it discovered the County's breach in failing to grant step increases on an employees anniversary date in

⁴ There is no record evidence which of the employees that were still moving trough the 9 step wage matrix, if any, received satisfactory evaluations.

2015. It asserts that it cannot grieve an issue if it does not have constructive knowledge of the violation.

The alleged breach of contract giving rise to the Union's grievance is that it contends the County was required by the MOA to grant eligible employees a step increase on their anniversary date in 2015. The potentially affected employees are Kelly Brown, Joe Doblar, Joel Grams, Joey Vought, Alex Yonker and Jeff Yonker. It is undisputed no step increases were granted on those employees anniversary dates in 2015. The County argues that the grievance was not timely filed and, consequently, bears the burden to proof that assertion. None of these employees were called to testify, and there was no testimony establishing if and when they received their evaluations in 2015, and when they first became aware they had not received a step increase in 2015. Also, there is no record evidence establishing how the employees on whose behalf the grievance was filed are paid in order to show when it was likely they should have known, if they were not told, they had not received a step increase. Are they paid weekly, bi-weekly, monthly, etc.

Consequently, the record evidence does not conclusively establish when, for example, Jeff Yonker received a paycheck after his November 26th, anniversary date that would have told him he didn't receive a step increase. Evidence establishing when he received his evaluation and what he was told, if anything, regarding a step increase, in the undersigned's opinion, is critical to determining when the 21 calendar day period for filing a grievance began to run.

In order to deny the Union a hearing on the merits of the grievance it must be conclusively established that the Union's grievance was not timely filed. In this case I am not persuaded the record evidence conclusively establishes the Union's January 20, 2016 grievance was untimely, at least with respect to Jeff Yonker. Furthermore, because the grievance is concerned with the timing of annual step increases for eligible employees, I am persuaded that if that issue is not resolved now this dispute could arise again in 2016 when an eligible employee is not granted a step increase on his/her anniversary date.⁵ And, therefore, it would be a disservice to the parties to not rule on the

⁵ No evidence was adduced regarding evaluations and step increases that might have occurred subsequent to January 20, 2016

merits of this grievance and potentially require them to devote time and energy to relitigating this issue.

For these reasons I will proceed to the merits of the grievance If the Union prevails on the merits of the grievance, the timing of the grievance filing will necessarily factor into the determination of an appropriate remedy.

Regarding the merits of the grievance, the Union contends that item #5 of the MOA executed on December 30, 2014, requires the County to grant a one step increase on the 9 step wage matrix on an employee's anniversary date, if that employee received a satisfactory evaluation. The Union argues that the record evidence clearly demonstrates the parties had a meeting of the minds regarding when employees would receive step increases. The Union believes the testimony of White, the County's primary spokesperson during the negotiation sessions giving rise to the MOA, demonstrates that there was a meeting of the minds as to the term anniversary date being the employee's hire date. The Union asserts that item #4 of the MOA confirms that employees who were moving through the steps on 2014-15 Agreement's Appendix A wage schedule and were initially placed on the new 9 step wage matrix based upon their years of service, their placement on the new wage matrix did not include step increases for 2015. The Union argues step increase was a separate and distinct issue from placement and was dealt with in item #5 of the MOA. The Union asserts that White echoed that understanding in his testimony - future step increases were subject to item #5 of the MOA and would occur on an employee's anniversary/hire date in 2015.

The Union also contends that because Thongvivong in her November 18, 2014, email to Union representative Spiegelhoff advising him that the new wage 9 step matrix had been approved by the County Board used the term "place" four times, and argues that if she really meant initial placement also included step increases she failed to communicate that to the Union, and had numerous opportunities to do so. The Union also avers that she was a member of the County bargaining team and was also involved in drafting the MOA. The Union agrees that the County wanted to change the way employees were evaluated from all employees being evaluated at approximately the same time, on or about November 1st, to a staggered system where employees would be evaluated throughout the year on their anniversary date.

The Union also contends the prior evaluation process provided a step increase in close proximity to the time of the employee's evaluation, and that the County's position that under the MOA employees would be evaluated on their hire date, but would not received a step increase in close proximity to their evaluation, causes a nonsensical result. For example, an employee evaluated in March of a given year would not receive the step increase until the following January. And, the Union believes such a delay deviates from the purpose evidenced in the MOA when the parties' intent was to evaluate employees on or near their hire date and grant step increases shortly thereafter. By not granting step increases in 2015 on the employees' anniversary dates the County violated the MOA and the collective bargaining agreement.

The County argues that the MOA language does not support the Union's claim. It asserts that the language of Appendix A of the 2014-15 collective bargaining agreement states, "each employee covered by the terms of this collective bargaining agreement shall receive one step increase each year of the contract applied January 1, 2014, & January 1, 2015". It contends that language of the contract is clear and unambiguous. It asserts the Union's interpretation of item #5 of the MOA is not reasonable in light of the plain meaning of the language of Appendix A, as well as the custom and practice of the parties in regard to the timing of step increases. It also avers that if the Union's interpretation of the MOA language were adopted it would provide that the annual step increase would occur more than once per year, and that result is inconsistent with the Appendix A language stating each employee will receive one step increasing each year of the contract applied January 1, 2014, and January 1, 2015.

The County argues in the alternative that if the MOA item #5 language is found to be ambiguous by the undersigned then the long standing principle of contract interpretation holding that ambiguous language should be construed against the drafter must be applied and the County's interpretation adopted because the record clearly demonstrates that the Union drafted the MOA item #5 language and there is no evidence that Thongvivong made any changes to the multiple drafts of the MOA language Spiegelhoff sent her, and certainly made no changes to item #5.

The County also asserts that the Union has failed to adduce any evidence to support its contention that the parties agreed to change the date when step increases were to be granted. Thongvivong was a member of the County negotiating team who attended all of the negotiation sessions and testified that there was no agreement reached in those negotiations to change the date when step increases were granted or, that they would no longer be granted on January 1st. She testified that White never said to the Union's bargaining team that step increases would be given on an employee's hire/anniversary date instead of January 1st, nor did she ever hear him say that to Spiegelhoff. She also testified that White never conveyed to her at any time that it was his understanding that steps would be granted on the employee's anniversary date. The Employer also contends that Newman, who attended two of the three negotiation sessions leading to the MOA testified that the timing of performance evaluations was not linked to when step increases were to be given.

The County, therefore, concludes that its intent conveyed at the bargaining table was that performance evaluations needed to be spread out over the course of the year instead of bunched up and completed by November 1st to allow Newman more time to complete the evaluations. Furthermore, the Union did not call a single Union bargaining team member to testify regarding the Union bargaining team's understanding of the discussion regarding the change in timing of the evaluation and what impact the change would have, if any, on the timing of step increases. Nor did the Union present other evidence to support its assertion that there was discussion or a proposal made during the negotiations over placement of employees on the new wage matrix to also change the timing of step increases.

The undersigned is persuaded that record evidence clearly establishes that during the negotiations regarding placement of employees on the new 9 step wage matrix the parties did not amend the language contained in Appendix A of the 2014-2015 collective bargaining agreement. That Appendix A included a 15 step wage schedule for Heavy Equipment Operators, Engineer/Signing Technician and Heavy Equipment Mechanic classifications. In addition, on the same page below that 15 step wage schedule are several paragraphs providing for additional pay for employees assigned to work out of their classification, additional pay for employees filling in as Landfill Operator, that the anniversary date for employees hired prior to January 1, 2005 will be January 1st, a clothing allowance, additional compensation for employees when operating certain

identified pieces of equipment, in addition to the language setting forth that employees will receive a one step increase on January 1, 2014 and January 1, 2015. All of that language remained in the tact, unmodified, after the parties' execution of the MOA on December 30, 2014.

Therefore, Union's contention that item #5 of the MOA requires the Employer to grant a step increase to eligible employees on their anniversary date, if adopted, would required the County to grant any employee moving through the new wage matrix a step increase on January 1, 2015, as well as another step increase on their anniversary date during calendar year 2015. In other words, an employee moving through the wage matrix under the Union's proffered interpretation of item #5 of the MOA would be entitled to two annual step increases in calendar year 2015.

The parties do not dispute that during the negotiation regarding placement of employees on the new 9 step wage matrix the County Board discussed the issue of when employee evaluations should occur. It is also undisputed that County Commissioner White and County Engineer Newman wanted to move away from having all employee evaluations conducted at about the same time and completed by November 1st each year. White testified he believed they would be more thorough if done on that timetable and would accommodate Newman's desire for more time in which to complete them. Thus, the parties agreed that evaluations would be conducted on the employee's anniversary date necessarily spreading their preparation throughout the calendar year. That agreement is reflected in item #5 of the MOA.

White testified that for some time he had pushed for a better evaluation system because he was of the opinion evaluations had little value when they were all done at once in a short period of time because management wasn't being given enough time to do proper evaluations. He also testified that he was involved with development of the new wage matrix and had several discussions with Thongvivong regarding the matrix as well as discussions regarding offering a higher rate of pay to new Heavy Equipment Operators because of the difficulty the County was having in hiring HEO's. White stated that when the County, in the fall of 2014, hired an HEO at \$17.59/hour, a rate of pay that was not on the Appendix A wage schedule of the collective bargaining agreement, he concluded that the Union's assertion at the time that doing so unilaterally was an unfair labor

practice was correct. He testified that the MOA resulted from negotiations with the Union and conversations among Board members about what the rate of pay should be and how to deal with the Union's issue. He said the County Board approved a new matrix and then negotiated the matrix and placement of employees on it with the Union. He testified there were discussions with the Union regarding internal equity, where employees would be placed on the new matrix, and that some Heavy Equipment Operator's wage rates would be retroactively increased effective November 3, 2014, to the \$17.59/hour the County had offered to two newly hired HEO's.

White also testified there was discussion regarding evaluations during these negotiations and that he was in favor of conditioning step increases on an employee receiving a satisfactory evaluation, rather than the step increase being automatic after another year of employment. He stated that he believed requiring a satisfactory evaluation brings about employee accountability. He also testified that in those negotiations most of the conversations pertained to items #1- #4 of the MOA. When White was asked on direct examination what he conveyed to the Union with respect to item #5 he responded that anniversary date was the date of an employee's hire at the County and that "people knew what I meant - we had a meeting of the minds - I know the Union knew what I meant - anniversary date was yearly on the date of hire". He also testified that he thought it was during the first or second meeting when his intent was conveyed, but that most likely it was at the second meeting. Later, he testified that in the first negotiation session the parties talked about placement of existing employees on the new matrix and did not talk about item #5 of the MOA or Appendix A of the contract. He also stated that his input regarding the language of item #5 of the MOA was the inclusion of the word "eligible" because that term was used in the County policy manual. When asked about his conversations with Union representative Spiegelhoff regarding his concern about step increases having been granted annually on January 1st, the draft language of item #5 of the MOA, and whether he conveyed his concerns to County representatives he responded, "no, Spiegelhoff was going to send them to Thongvivong.

In the undersigned's opinion the language of item #5 providing employees "shall be eligible for yearly step increase after a satisfactory job evaluation on their anniversary date" is ambiguous. As written does it mean, as the Union argues, "after receiving a

satisfactory evaluation an employee will be eligible for a step increase on their anniversary date", or does it mean, as the County argues, an employee who receives a satisfactory evaluation on his/her anniversary date will be eligible to receive a step increase on January 1st"? I am persuaded that ambiguity must be resolved in the County's favor. White's testimony is not persuasive that the parties' had a meeting of the minds with the intent to not only require that employee evaluations be conducted on an employee's anniversary date but, also, if an employee received a satisfactory evaluation on his/her anniversary date he/she would also be entitled to receive a step increase effective on his/her anniversary date.

There are several reasons footing my conclusion. First, if it truly was discussed by the parties when they negotiated the language of the MOA that step increases granted to employees moving through the wage matrix would no longer be applied on January 1, 2015, but rather on the employee's anniversary date in 2015 it is inconceivable that there would have been no discussion in those negotiations regarding the language of Appendix A providing for step increases to be granted on January 1, 2015. And, it is equally inconceivable that if employees moving through the steps of the matrix would receive step movement effective January 1, 2015 as provided in item #4 of the MOA that there would not have been at least some discussion of amending the language of appendix A of the 2014-2015 collective bargaining agreement as well as the cost impact to the County of also potentially granting those same employees another step increase later in calendar year 2015 inasmuch as their placement on the new matrix was intended to address County concerns regarding the competitiveness of the County's HEO wages. Yet, White, the only witness called by the Union, did not testify to any such discussion occurring in the negotiations and when asked explicitly what he had stated to the Union regarding this issue he testified, "they knew what I meant".

Unless the record evidence clearly establishes that it was agreed by the parties, was their intent, that the language of Appendix A of the 2014-2015 collective bargaining agreement pertaining to when step increases would be effective was either to be deleted, ignored, or still applied; and that any employee step increase would occur later in calendar year 2015, or there is clear and unambiguous language included in the MOA providing for same White's testimony, standing alone, does not persuade me that there

was a meeting of the minds between the County and Union reached in negotiations supporting the Union's proffered interpretation of item #5 of the MOA.

Second, Spiegelhoff's 1st draft of the MOA that he emailed to Thongvivong contained a paragraph #6 stating, "The aforementioned employees in #3 excluding Steve Burdick and all new hires shall receive any applicable step increases on their anniversary date". The reference to item #3 in that language was obviously a typo because the employees listed in item #3 were "off scale" employees not moving through the matrix, whereas the employees identified in item #5 of that 2nd draft were moving through the matrix and included employee Burdick. However, that language no longer appears in Spiegelhoff's 2nd draft, but language similar to the final version item #5 first appears. Confusing is that in Spiegelhoff's 3rd draft he included a new item #5 and renumbered his 2nd draft item #5 to item #6. The new language of his 3rd draft item #5 provided "all employees who currently (sic) advancing through the steps and have not reached the maximum wage rate and not (sic) shall receive any step increase on their anniversary date". It seems clear that it was a typographical error to have placed the word "not" before the word "shall" and rather the language was intended to read "and shall not receive * * *". But, that language does not appear in Spiegelhoff's 4th and final draft, but rather, in its palace, is the language of item #5 on which the Union now relies on herein.

If it was the parties' intent that employees were to receive a step increase on their anniversary date in 2015 then why would Spiegelhoff have proposed language in his 3rd draft. Most importantly these were drafts prepared by the Union, yet it offered no testimony to explain why language stating employees would not receive step increases on their anniversary date was included in his 3rd draft and not included in his final draft. Absent some explanation, particularly in the face of the language of Appendix A specifying step increases were to be granted on January 1st in 2014 and 2015, and the significant step movement that had already occurred effective January 1, 2015 when employees were placed on the new 9 step matrix, a reasonable inference to be drawn is that the language was unnecessary and superfluous because the language in Appendix A of the 2014-2015 collective bargaining agreement specifying that step increases would be applied on January 1st remained unchanged.

For these reasons I am persuaded that the language of item #5 of the MOA did not require the County to grant employees a step increase on their anniversary date in 2015 after receipt of a satisfactory evaluation on that date.

Based upon the testimony, exhibits and argument the undersigned enters the following

AWARD

1. The County did not sustain its burden to conclusively prove that the subject grievance was untimely as to some or all of the affected employees when it was filed on January 14, 2016.

2. The County did not violate the collective bargaining agreement and/or Memorandum of Agreement – 2015 Appendix A – Wage Schedule that the parties executed on December 30, 2014, when it did not grant a step increase to any employee in calendar year 2015 on or about their anniversary date/hire after they had received a satisfactory evaluation.

Therefore the grievance is denied.

Entered this 23rd day of September 2016.

Thomas & Paeger
Thomas L. Yaeger

Arbitrator